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No. 98

In the Supreme Court of the United States

October Term, 1959

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UNION PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA.

o——o——o

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,
WESTERN DIVISION

o——o——o

APPELLANT'S MOTION TO ENLARGE TIME FOR ISSUE OF JUDGMENT

o——o——o

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Now comes the Union Pacific Railroad Company, appellant in the above entitled cause, and respectfully moves that the time for issuance of the judgment of the Court in this cause be enlarged until May 25, 1960, for the following reasons:

1. On April 3, 1959, the United States District Court for the Southern District of Iowa issued findings of fact and conclusions of law holding that in providing a slow or delayed service in the transportation of lumber without the service being specified in published tariffs appellant violated § 6(7) of the Interstate Commerce Act and § 1

of the Elkins Act. The District Court thereupon issued summary judgment against appellant (R. 223) and an injunction, the last paragraph of which provides (R. 225)—

> "The Union Pacific Railroad Company, defendant, and its officers, agents, and servants be and they are hereby permanently enjoined and restrained from extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of shipments of lumber, *unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities.*" (Italics supplied.)

2. On appeal this Court affirmed by a per curiam opinion announced April 4, 1960, reading in part as follows:

> "* * * We agree with the District Court that such delayed service constitutes the furnishing of additional 'privileges or facilities' under § 6(7) of the Interstate Commerce Act, and, therefore, must be published and filed in its tariff. 49 U. S. C. § 6(1). See *Turner Lumber Co. v. Chicago, M. & St. P. R. Co.*, 271 U. S. 259, 262 (1926).
>
> "If and when appellant publishes and files such a tariff, as other roads have already done, the Commission can then consider the reasonableness and justness of appellant's service in the light of that rate, giving due regard to any unjust or unreasonable preferences or advantages that might result to shippers or other roads should the same not be approved."

3. Under Rule 59 of this Court the judgment will issue as of course after the expiration of twenty-five days from the date the judgment was entered, or immediately after April 29, 1960, unless the time is shortened or enlarged by an order of the Court.

4. In an effort to comply with the decisions of this Court and the District Court that its slow lumber service must be published and filed in tariff form, appellant on April 18, 1960, filed with the Interstate Commerce Commission paragraph (g), Item 215-C, Supplement 11 to Freight Tariff 6061-0, I. C. C. 5497 (copy of which is attached hereto as Appendix A), publishing its slow lumber service in tariff form. Under § 6(3) of the Interstate Commerce Act the tariff can not become effective except after thirty days' notice to the Commission and to the public, unless the Commission, in its discretion and for good cause shown, grants special permission allowing the tariff to become effective upon less than the required thirty days' notice. Since the statutory thirty-day period would not expire until May 19, 1960, appellant also filed with the Interstate Commerce Commission Sixth Section Application 2705 (copy of which together with letter of transmittal is attached hereto as Appendix B) for special permission of the Commission permitting publication of the tariff so as to become effective on less than the thirty-day statutory period, or on April 29, 1960, thus permitting the tariff to become effective before this Court sends its judgment down to the District Court. On April 22, 1960, the Commission denied the Sixth Section Application thus refusing to allow the tariff to become effective before this Court sends its judgment down to the District Court.

5. The Commission may now allow the tariff to become effective on May 19, 1960, at the expiration of the full thirty-day statutory period, or it may, under the exercise of its power under § 15(7) of the Interstate Commerce Act, suspend and prevent the tariff from becoming effective for a period of seven months after May 19, 1960, and enter upon an investigation to determine the lawfulness of the tariff.

6. It is impossible for appellant to foretell which of the two courses the Commission may pursue; however, if the Commission allows the tariff to become effective at the end of the thirty-day statutory period on May 19, 1960, this Court's judgment presumably will have been issued and if the District Court promptly makes its injunction effective appellant would be faced with the injunction for a period of possibly fifteen days before its tariff could become effective. If the Commission suspends the tariff appellant will cease providing slow lumber service pending development of circumstances under which it may be lawfully restored.

7. The tariff which appellant has filed with the Commission, although not identical, is similar to and accomplishes the same purpose as rules now in effect in tariffs of certain other western railroads and under which those roads are now and will, unless and until the Commission finally determines their tariffs to be unlawful, continue furnishing slow or delayed lumber service, as described in the Commission's report in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points* (308 I. C. C. 247). That proceeding is still pending before the Commission upon petitions for reopening and reconsideration, as pointed out at page 21, footnote 6, of appellant's brief, and at page 10, footnote 3, of the Government's brief in this Court. In its application for special permission for its tariff to become effective on April 29, 1960, appellant states in next to the last paragraph on page 3 thereof, as follows:

> "* * * Whatever final disposition is made of those proceedings will be acceptable to the Union Pacific as disposition of the rule which we herein seek authority to make effective on April 29, 1960."

8. As the twenty-five day period provided by Rule 59 of this Court before issuance of judgment is five days less

than the thirty-day statutory period provided by § 6(3) of the Interstate Commerce Act for filing tariffs with the Commission it was impossible from the beginning for appellant to comply with the Court's decision that the slow service must be published in tariff form unless the Commission would grant special permission to publish the tariff on less than thirty days' notice, which it has refused to do, or unless this Court would enlarge the time for issuing its judgment to the District Court. And, as appellant has done everything within its power to get its tariff on file with the Commission and in effect, but has no way of ascertaining whether the Commission will let the tariff become effective at the expiration of the full thirty-day period on May 19, 1960, or suspend it before that date, appellant respectfully submits that the Court should not issue its judgment and that the present status should be maintained until the statutory administrative procedures required to permit appellant's tariff to become effective can have time to operate. See *City of Yonkers, et al., v. United States, et al.*, 321 U. S. 745.

9. Many hundreds of carloads of lumber from the West are now and are continuously en route in slow service on the route of the Union Pacific or numerous other available transcontinental routes. A large number of western shippers must have that type of transportation service and would be seriously damaged if it suddenly stopped. It seems clear that it is in the best interest of the numerous shippers and the carriers involved that appellant and any other carriers that may choose to follow the same pattern be permitted to publish such a tariff rule as appellant has filed with the Commission so that it can be reviewed by the Commission in the light of this Court's opinion in further proceedings which will undoubtedly be conducted by the Commission in its Investigation and Suspension Docket

7050, *Lumber—Free Time Allowance at Hold Points*, the final disposition of which appellant has agreed to accept.

Wherefore, Union Pacific Railroad Company, appellant, prays that the time for the issuance of the judgment of this Court be enlarged until May 25, 1960.

Respectfully submitted,

ELMER B. COLLINS,
Counsel of Record
for Appellant,
1416 Dodge Street,
Omaha 2, Nebraska.

F. J. MELIA,
JAMES H. ANDERSON,
Attorneys for Appellant.

April, 1960.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 23rd day of April, 1960, I served copies of the foregoing Motion to Enlarge Time for Issue of Judgment on the adverse party as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Roy L. Stephenson, Esq.
United States Attorney
202 U. S. Court House
Des Moines, Iowa

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Daniel M. O'Donoghue, Esq.
Attorney
Bureau of Inquiry and Compliance
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
Counsel of Record
for Appellant.